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We have been much interested in a pamphlet containing a review of the decision of the United States Supreme Court in the Trans-Missouri Freight Association Case, known as the "traffic" decision, written by Wm. L. Royall, Esq., of the New York bar. The essay is entitled "the pool and the trust" and is intended to present their side of the case. The author while taking exceptions to the conclusion of the court in the case mentioned, maintains that the proposition he is contending for was not submitted to the court in the argument of that case or considered by it, and therefore the decision cannot be claimed to be a decision against it. The propositions urged by Mr. Royall are that the "trust" is in perfect harmony with the elementary principles of our laws, and that it is under the sanction and protection of the constitution of the United States. In calling attention to this pamphlet we do not assume to indorse either the reasoning or conclusions of its author, but mention it simply as a matter of interest to those who are interested in knowing what is to be said on both sides of this important question.

We have also received a pamphlet containing a brief discussion of the law applicable to endowment life insurance policies carried by insolvent debtors, written by Lucius Weinschenk of the Denver bar. The point for which he contends will, perhaps, strike many as being opposed to their preconceived notions on the subject. That a beneficiary of a life insurance policy has a vested interest therein is generally understood. That such is not the law as to endowment life policies, those who have given the subject no investigation will probably be surprised to learn. Such is the contention of Mr. Weinschenk. An investigation of the authorities, which are noted in the pamphlet, he claims sustain the proposition that an endowment life insurance policy, even though payable to another party as beneficiary remains the property of the assured so long as he is alive, all the terms and conditions being complied with. He says that the insurance cases in the books holding that the beneficiary in insurance policies obtains a vested irrevocable interest therein do not apply to policies of this sort.

A man without any money in his pocket goes into a restaurant, orders a good dinner, eats it, and then tells the proprietor he has no money and cannot pay. How is the law to deal with a person who deliberately and fraudulently acts in this way? Such a case does not probably arise very often, but one of the English courts has recently been struggling with the question. There the prisoner was indicted in two counts, the first charging him with having falsely pretended to the prosecutor that he was then able to pay him for certain food, and that he then had and possessed sufficient money to pay for the food, by means of which false pretenses he obtained the food from the prosecutor. The second count was framed under a statute which provides that any person shall be guilty of a misdemeanor "if in incurring any debt or liability he has obtained credit under false pretenses or by means of any other fraud." The jury convicted the prisoner on both counts, but, on appeal, the upper court held that conviction on the first count was improper. It was admitted that the defendant spoke no words which could be construed into a false pretense, and that he did no act to induce the prosecutor to believe anything false, beyond ordering the food and consuming it. It was argued that to convict a person of having made a false pretense by conduct, more than this must be proved, and that it is necessary to show that he actively did something to induce the false belief, and did not merely passively allow the prosecutor to form the false impression. This view the court took, and came to the conclusion that, under the circumstances, there was no evidence upon which the prisoner could properly be convicted upon the first count. At the same time, however, the court intimated that it was not intended in any way to throw doubt upon the cases which decide that there may be a false pretense by conduct alone, such as Reg. v. Barnard (7 C. & P. 784), where a person at Oxford, not a member of the university, put on a cap and gown, thereby obtaining goods on credit as if he were an under-

graduate, and it was held he was properly convicted of obtaining the goods by a false pretense. Upon the second court of the indictment, the court held that clearly there was an obtaining of credit. The prisoner was supplied with goods on the implied agreement that he would pay for them in the future, that is to say, at the end of the meal, and the shortness of the time for which credit was given was not material. The court also held that there was ample evidence to prove fraud. The ordinary custom is, that persons eating at restaurants shall pay for the food soon after they have consumed it, and before they quit the premises. The prisoner knew that the food was supplied to him in the belief that he would follow the ordinary custom, and he also knew when he consumed it that he was not in a position to pay for it. This the court held was clearly fraud. Many will agree with the London Solicitors Journal in its criticism of the action of the court in holding that there was no evidence to support the first count. It was admitted by the court that a person may make a false pretense by conduct alone, without making any false statement in words. It was also recognized that it is the universal custom for persons dining at restaurants to pay immediately after the meal, and it was held (in effect) that the prisoner's fraud consisted in taking unfair advantage of this custom. Now, a false pretense is a false and fraudulent representation as to some existing fact, which may be made either by words or by conduct. Nearly every one who dines at a restaurant, at the time he orders his dinner has money in his pocket sufficient to pay for it. Certainly the customer is supplied by the restaurant keeper only in the belief that he is then possessed of so much money, and is able and willing, when he has eaten his dinner, to pay the ordinary and reasonable charges. Is it not fair, then, to conclude that a person who enters a restaurant and orders dinner in the usual way, does, by those very acts, hold himself out to the proprietor as one in the position of other persons who act in a similar manner—*i. e.*, he by his conduct represents that he has in his pocket at the time enough money to pay for what he orders? If, after having made this representation, it turns out that he has not enough money, and that he knew it, and intended to defraud, surely he has made a false representation as to an existing fact and is liable to be convicted of obtaining the food by a false pretense. The court held that there was evidence of fraud. But in what did the fraud consist? Unless the fact that he deliberately acted in such a manner as to get the food by leading the prosecutor to believe he was possessed of money to pay for it constituted the fraud, it is difficult to see in what it did consist. And if so acting was the fraud, the line between such a fraud and a false pretense is so fine as probably to be invisible to the majority of eyes.

NOTES OF IMPORTANT DECISIONS.

CONSTITUTIONAL LAW — CONTRACT CLAUSE FEDERAL CONSTITUTION—LOTTERY—POWER OF STATE LEGISLATURE.—The Supreme Court of the United States in the case of Douglas v. The Commonwealth of Kentucky, holds that an agreement between an individual and the city of Frankfort Ky., by which the latter became the owner of the lottery scheme devised by that city under authority of law, was not a contract, the obligation of which the State was forbidden by the constitution of the United States to impair, either by legislative enactment or constitutional provision, and that the legislature of a State cannot contract away its power to establish such regulations as are reasonably necessary from time to time to protect the public morals against the evil of lotteries. In New Orleans v. Houston, 119 U. S. 265, it was decided that while a lottery grant was not a contract within the meaning of the federal constitution, the obligation of which was protected against impairment by the State making the grant, the legislature could not strike down a lottery which the fundamental law of the State had authorized. The court now holds in its latest decision that that court must determine upon its own responsibility in each case as it arises whether that which a party seeks to have protected under the contract clause of the constitution of the United States is a contract, the obligation of which is protected by that instrument against hostile legislation. The court, after commenting upon the decision of the Court of Appeals of Kentucky in Gregory, Ex., v. Trustees of Shelby College Lottery, held that a lottery grant is not in any sense a contract within the meaning of the constitution of the United States, but is simply a gratuity and license which the State, under its police powers and for the protection of public morals, may at any time revoke and forbid the further enactment of the lottery, and that no right acquired during the life of the grant on the faith or by agreement with the grantee can be exercised after the revocation of

such grant and the forbidding of the lottery, if its exercise involves a continuance of the lottery as originally authorized. All rights acquired on the faith of a lottery grant must be declared to have been acquired subject to the power of the State to the extent indicated in the opinion.

CARRIERS OF PASSENGERS—WHO ARE PASSENGERS. — The courts of a number of the States have recently passed upon the question as to who are passengers within the law relating to liability for injury sustained, the facts in each case determining the relation borne by the injured party to the carrier being some what out of the ordinary. In Illinois Central R. Co. v. O'Keefe, 48 N. E. Rep. 294, decided by the Supreme Court of Illinois, it appeared that a person having a pass boarded a vestibuled train after it had left the depot, stepping on the front platform of the baggage car, the door of which was locked. The conductor, after taking up the tickets, was about to unlock the door to see about the person on the front platform, when a collision occurred and such person was killed. It was held that the relation of passenger and carrier, so as to render the railroad company liable, was not established. In Cleveland, etc. Ry. Co. v. Wade, 48 N. E. Rep. 12, before the Appellate Court of Indiana, it was held that it is not negligence *per se* for a railroad company to have attached to its passenger train one or more vestibule cars whose doors are closed and locked. It appeared that the coach next to the rear one was "vestibuled" and stood sixty feet from the platform; that the doors to it and the rear car were locked; that they were not intended for the use of passengers at such station; that the lights in all the coaches were lit; that plaintiff, who had been upon the platform several minutes, got on the front end of the vestibule car about the time the train started; that he did not then know that the door was locked, or that the car was not intended for the use of passengers at such station; that he attempted to pass from the steps of the vestibuled car to the car in front of it while the train was moving, and fell. It was held that the railroad company was not guilty of actionable negligence. The Supreme Court of Texas, in Missouri, K. & T. Ry. Co. v. Williams, hold that one who, without a ticket, boards a train carrying passengers, although prepared to pay his fare, and with a *bona fide* intention of doing it, is not a passenger if he takes passage on a part of the train not intended for passengers.

PAYMENT — RECOVERY OF MONEY PAID FOR VOID LICENSE.—In City of Maysville v. Melton, 42 S. W. Rep. 754, it is held by the Court of Appeals of Kentucky, reversing the lower court, that money paid to a city for a license to conduct a lottery is voluntarily paid, and cannot be recovered, though the license affords the licensee no protection, where, with knowledge of the existence of a law forbidding such a license, he insisted that it should be issued to him, asserting that he had a vested right to conduct a lottery, which the State could not take from him. The court after distinguishing City of Owensboro v. Elder, 3 Ky. Law Rep. 255; Trustees v. Hite, 2 Ky. Law Rep. 386; Fechemier v. Louisville, 84 Ky. 306; McMurty v. R. R. Co., 84 Ky. 462; City of Newport v. Ringo's Executor, 87 Ky. 635; Gist v. Smith, 78 Ky. 367, and citing as authority City of Louisville v. Anderson, 79 Ky. 334, and Louisville & N. R. Co. v. Hopkins County, 87 Ky. 605, says that "it seems to be well settled in this State that where taxes are paid to a collecting officer, who has power of distraint, such payment is not a voluntary payment. It is also well settled that where money is paid under a mutual mistake, which in law, morals, and good conscience ought not to be retained, it can be recovered back. The proof in the case at bar does not show that the money paid for the license to carry on a lottery in the city of Maysville was paid through any coercion, but that the payment was sought to be made by the appellee to the authorities of the city of Maysville; that said payment was made to the treasurer of the said city without his solicitation or demand; that when appellee presented the receipt to the mayor, and demanded license, the mayor doubted authority to issue same, and did not do so till urged by the appellee; that the appellee was representing the owners of the combined lotteries of the State of Kentucky; that appellee knew that the legislature of Kentucky had repealed the charters of the companies and franchises under which he proposed to operate. The proof as presented shows that appellee did not pay the money for the license under any mistake of fact or of the law; wherefore the judgment of the circuit court is reversed, with directions to grant a new trial."

SALE — IMPLIED WARRANTY. — In Hanson v. Hartse, 73 N. W. Rep. 163, decided by the Supreme Court of Minnesota, it was held that upon a sale of a domestic animal to a retail butcher, engaged in the business of slaughtering such animals, and selling their flesh to his customers for their use as food, there is no implied warranty that the animal is fit for food, although the vendor knows the purpose for which the butcher buys it. The court says, in part, that the lower court "submitted the case to the jury exclusively upon the theory that there was an implied warranty on part of the defendant that the meat of the animal was fit for domestic use, and instructed them that if they found that the meat was diseased and unfit for use as food (upon which the evidence was undisputed) the plaintiff would be entitled to recover, unless they also found that at the time of the sale he was advised by the defendant that the animal had a disease that made the meat unfit for the purposes for which the plaintiff intended to use it. As there was no evidence that the defendant so advised the plaintiff, the charge of the court amounted to an instruction to find for the plaintiff, which the jury did. Hence the charge of the court can only be sustained upon the ground that, on the facts, there was an implied

warranty on part of the defendant that the animal was fit for food. The doctrine of an implied warranty on the sale of articles intended for food, if it exists at all, does not extend beyond the case of a dealer who sells provisions directly to the consumer for domestic use. It does not extend to sales between dealers, whether wholesale or retail, or to sell again, and not for consumption by the immediate buyer. We are not aware of any well-considered case to the contrary. While there are expressions in some of the cases which seem to favor a contrary rule, yet we think that an examination will show that in most of them it appeared that the seller knew or had reason to suspect at the time of the sale that the article was unsound and unfit for food, and concealed that fact from the buyer, and hence that the action was really one for deceit, and not on a warranty. Indeed it has been urged by able authorities that the doctrine of an implied warranty, even in the sale of provisions by a dealer to the immediate consumer, had its origin in the United States in a misconstruction of the meaning of the language used in 3 Bl. Comm. (p. 165), the claim being that the author only had reference to an action for deceit. And Mr. Benjamin in his work on Sales (section 670, *et seq.*) argues very forcibly that in England the responsibility of a victualer, butcher or other dealer in articles of food to the immediate consumer, for selling unwholesome food, was one imposed by statute, and did not arise out of any contract of implied warranty. There may be considerations of public policy which should take sales by dealers in provisions for immediate consumption by the purchaser out of the general rule of *caveat emptor*, but the exception to the rule certainly does not extend beyond that. This is not a new question in this court. Ryder v. Neitge, 21 Minn. 70. See Howard v. Emerson, 110 Mass. 350; Gierous v. Stedman, 145 Mass. 439, 14 N. E. Rep. 538; Benjamin on Sales (Amer. Ed.), note, pp. 647, 648."

LIFE INSURANCE — PREMIUM POLICY CANCELLED FOR FRAUD—ASSUMPSIT.—In McDonald v. Insurance Co., 38 Atl. Rep. 500, decided by the Supreme Court of New Hampshire, a policy of life insurance contained false statements inserted without the assured's knowledge and through the fraud of the assurer's agent. Upon discovery of the falsity of the statements the company cancelled the policy. In an action by the insured to recover the premium, Mr. Justice Blodgett, in delivering the opinion of the Supreme Court of New Hampshire, said that he might recover the premium so paid, less a deduction for the value of the insurance enjoyed by him during the life of the policy, "and this he may recover in an action for money had and received, which is an equitable action, and may in general be maintained whenever the defendant has money belonging to the plaintiff, which, in equity and good conscience, he ought to refund him." The *American Law Register* in a review of this case says that "it is submitted that this decision cannot be sustained. If the plaintiff be allowed to recover at all, it must be upon the theory that the fraud of the company's agent entitled the plaintiff to rescind the policy. If, then, he is entitled to rescind, he is entitled to recover the entire premium, because at no time was the policy ever in force as against the insurer (Ins. Co. v. Fletcher, 117 U. S. 519) (1885), and the plaintiff therefore never enjoyed any insurance. The case of Ins. Co. v. Stalham, 93 U. S. 24 (1870), referred to in the opinion of the court, has no application, for then the policy was in force till terminated by the non-payment of premiums. If the plaintiff can recover at all, his measure of recovery is the entire premium, as that is the sum which in equity and good conscience should be refunded to him. See Martin v. Sitwell, 1 Show. 156 (1691), and Feise v. Parkinson, 4 Taunt. 640 (1812)."

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE.—In Willis v. Providence Telegram Pub. Co., 38 Atl. Rep. 947, it was decided that where plaintiff's horse became frightened by a collision with defendant's negligently driven team, and plaintiff seized her horse by the bridle rein in her attempt to prevent him from running away, and was injured in so doing (her baby being in the wagon to which her horse was hitched at the time), the proximate cause of the injury could not be said, as matter of law, to be some act intervening between the collision and the injury. The court said in part: "The doctrine of proximate cause, in cases of accident resulting from the frightening and consequent running away of horses on the highway, as deduced from the numerous adjudications thereon, seems to be that the negligence which causes the fright and consequent running away of the horse is the proximate cause of the injury, and that this is so although some intervening cause contributed to the injury. Busw. Pers. Inj. section 99. At any rate, the question of concurring causes, as held by this court in Yeaw v. Williams, 15 R. I. 20, 23 Atl. Rep. 33, is a question for the jury, under proper instructions, and hence cannot be determined on demurrer, unless, indeed, it clearly appears from the declaration that the proximate cause of the injury was the plaintiff's carelessness. See, also, Wilson v. Dock Co., L. R., 1 Exch. 186. Judge Cooley, in his work on Torts, states the law of proximate cause thus: "If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause, passing by those which were innocent." And this summary of the law is abundantly sustained by the authorities. See Add. Torts, sec. 12; Shear. & R. Neg. (2d Ed.), secs. 10, 33; Campbell v. City of Stillwater, 32 Minn. 308, 20 N. W. Rep. 320; Wood v. Railroad Co., 177 Pa. St. 306, 35 Atl. Rep. 699; Hoag

v. Railroad Co., 85 Pa. St. 293; Derry v. Flitner, 118 Mass. 134; Kennedy v. Mayor, etc., 73 N. Y. 365; Sturgis v. Kountz, 165 Pa. St. 358, 30 Atl. Rep. 976; Brown v. Railway Co., 20 Mo. App. 222; Billman v. Railroad Co., 76 Ind. 166, 16 Am. & Eng. Enc. Law, 436, and cases cited; Jagg. Torts, ch. 5; Scott v. Shepherd, 1 Smith, Lead. Cas. (Hare & W. Notes), *549; McGrew v. Stone, 53 Pa. St. 436; Railroad Co. v. Snyder, 18 Ohio St. 399; Connell's Exrs. v. Railway Co., 93 Va. 44, 24 S. E. Rep. 467. In the case of McDonald v. Snelling, 14 Allen, 290, where the question as to the proximate cause of an injury caused by a runaway horse through the negligence of the defendant was very fully considered, the court, in overruling the demurrer to the declaration, said, among other things: "It is clear, from numerous authorities, that the mere circumstance that there have intervened, between the wrongful cause and the injurious consequence, acts produced by the volition of animals or of human beings, does not necessarily make the result so remote that no action can be maintained. The test is to be found, not in the number of intervening events or agents, but in their character, and in the natural and probable connection between the wrong done and the injurious consequence. So long as it affirmatively appears that the mischief is attributable to the negligence, as a result which might reasonably have been foreseen as probable, the legal liability continues." In Mahogany v. Ward, 16 R. I. 479, 17 Atl. Rep. 860, this court recognized the same doctrine; for while it was there held that the independent act of a responsible person arrests causation, and is to be regarded as the proximate cause of the injury, the original negligence being considered merely the remote cause thereof, yet the court said that this rule "is subject to the qualification that, if the intervening act is such as might reasonably have been anticipated as the natural and probable result of the original negligence, the original negligence will, notwithstanding such intervening act, be regarded as the proximate cause of the injury, and will render the person guilty of it chargeable." See, also, Lee v. Railroad Co., 12 R. I. 383. It certainly cannot be said that a person who attempts to prevent his horse from running away when it has become frightened by a collision with another team is necessarily guilty of negligence, even though the person in charge of the horse is not in his carriage, and does not actually have hold of the reins at the time of the collision. And this is even more clearly so when a helpless child is in the carriage, and when the first impulse of every rational person would be to prevent the horse from running away. Whether or not the act of the plaintiff in any given case is in fact a rash, or even negligent, one, and, hence, such as would prevent him from recovering in an action of this sort, is for the jury to determine in view of all the circumstances of the particular case."

SALES AS COVER FOR USURY.

Among the varied schemes devised by the ingenuity of money lenders for the avoidance of the usury laws, few equal in cleverness that of a pretended sale. Generally, in cases of this character, the sale is only pretended, although at times actual sales are made collateral to a loan of money; and, in either case, if the price of the property be exorbitant, and other circumstances be unfair, the transaction is suspicious of usury.[1] With a *bona fide* sale the law will not interfere. It is only where the sale or pretended sale is made a device to corruptly secure the payment, in either money or its equivalent, of more than the lawful rate of interest, that the law will intervene. It is therefore of importance to distinguish a sale from a loan. Thus, in Kelly v. Lewis,[2] the court said: "To lend is to deliver to another for use, on condition that the thing loaned, or an equivalent of the kind, shall be returned. To lend State bonds would be to deliver them to another for use on condition that the bonds loaned, or other bonds of the same kind, equal in quality, should be returned, and that would not be usury. To deliver so many State bonds to another for use, on condition that an equivalent in money as the par value of the bonds should be returned, would be to sell and not to loan the bonds, and as a naked proposition would not be usury." But such a transaction as the latter would be open to inquiry, and if it should be proved that the sale was only pretended, that the bonds would not command par value, and that there was an intent to violate the law, the transaction would be in effect a loan and usurious. An absolute deed of land will not be set aside for usury;[3] nor can any *bona fide* sale be successfully attacked for usury.[4] The prices of

[1] Shanks v. Kennedy, 1 A. K. Marsh. (Ky.) 65; Andrews v. Pond, 13 Pet. 65, 20 M. F. D. 245; Deircks v. Kennedy, 16 N. J. Eq. 210; Fitzsimons v. Baum, 44 Pa. St. 32; Baggett v. Trulock, 77 Ga. 369, 3 S. E. Rep. 162; Pinch v. Willard (Mich.), 66 N. W. Rep. 42; Chesterfield v. Jansen, 1 Wilson, 286, 2 Ves. 125; Downes v. Green, 12 M. & W. 490.

[2] 4 W. Va. 461. See Mills v. Crocker, 9 La. Ann. 334; Van Shaack v. Stafford, 12 Pick. 565; Wheeler v. Marchbanks, 32 S. C. Rep. 594, 10 S. E. Rep. 1011.

[3] Den v. Dodds, 1 Johns. (N. Y.) Cas. 158.

[4] McGill v. Ware, 5 Ill. 21; Primley v. Shirk, 60 Ill. App. 312; Swayne v. Riddle, 37 W. Va. 291, 16 S. E. Rep. 512; Hoyt v. Bridgewater Mining Co., 6 N. J. Eq. 625; Saxe v. Womack (Minn.), 66 N. W. Rep. 269; Wadsworth v. Champion, 1 Root (Conn.), 393; Gruel

property when fairly fixed by the parties cannot be revised by the courts. All persons *compos mentis* are presumed to be able to take care of themselves in their business transactions, and if any one be so unwary as to allow another to unscrupulously worst him in a trade or sale the law will not interfere.[5] In the contract for the purchase of property the parties may agree upon damages to be paid in case of default, although such damages exceed the lawful interest.[6] Illustrating the general points of distinction between a sale and a loan are two other important cases. In one, Reger v. O'Neal,[7] the court observed: "Usury is interest exceeding the lawful rate for the loan or forbearance of money, and does not exist where such interest is essentially and honestly a part of the consideration in the purchase of land, even though it be called for in the form of a percentage on a principal sum, and be called 'interest,' and be in excess of the lawful rate; the interest, in such case of an honest purchase, where it is not a mere cover for what is in fact a loan, being as much a part of the purchase price as that part appearing as the principal." In the other case, Earnest v. Hoskins,[8] illustrating the other view, the court said: "It is immaterial in what form or pretense the usurious interest is covered in the contract. When a party is compelled to take goods at more than the market price in order to obtain a loan, the transaction is usurious. No contract, however framed, is good if the ultimate effect would be to secure more than the legal rate of interest. Where one man purchased land from another, at an exorbitant price, for the purpose of obtaining a loan, the seller making the loan to induce the purchaser, the transaction is usurious, and, under the act of 1858, the difference between the value of the land and what it sold for may be deducted from the debt. Fitzsimons v. Baum, 44 Pa. St. 32. The inquiry is not merely whether lands, goods or securities were sold for more than their market value, but whether the property was sold, and brought above its market price, as part of the bargain for the loan of money." Transactions of a speculative nature in connection with the loan of money should be closely scrutinized by the courts for the purpose of dertermining whether what appears to be two or more distinct transactions is really only one contract, and that usurious.[9] And where there is in fact only a loan, or the sale was the inducement to the loan or a concomitant part of it, and there is proof of the exaction of illegal interest with a corrupt intent, the transaction is usurious. Thus where a person desiring to raise money sold real estate with a guaranty that it would rise in price at the rate of fifty per cent. per annum, the transaction was clearly usurious.[10] And where A applied to B for a loan of $1,100 to buy public lands, upon which A had made improvements and which were about to be sold by the government, following which application an agreement was made by which B was to advance the amount with the understanding that the lands should be bid off by him as security for the loan, and that A should pay him $330 per year for three years and $1,430 at the end of four, when B was to sell and convey the land to A, the transaction was held to be usurious.[11] In another case, where A, being pressed with executions against him, applied to B for a loan of the sum of $800, and B refused to make the loan unless A would consent to purchase from him one hundred and twenty-four acres of wild land at the price of $550, which was much above its real value, and A reluctantly accepted the proposition and gave B a bond and mortgage for $1,350, payable in twelve equal annual installments with annual interest, it was held this transaction was usurious.[12] So where a person purchases a tract of land and pays for it by assigning notes which are apparently usurious, and subsequently the usurious notes, with a bonus added, are replaced by the debtor's new notes to the assignee, secured by a deed of trust, and the land colorably resold, the transaction is usurious.[13] It is, therefore, clear that the general rule above stated is unanimously supported by the authorities,[14]

v. Smalley, 1 Dur. (Ky.) 358; Parker v. Coburn, 10 Allen, 82; Faulcon v. Harris, 2 Hen. & Mun. 550.

[5] Esselman v. Wells, 8 Humph. (Tenn.) 482.

[6] Tardeveau v. Smith, Hard. (Ky.) 175.

[7] 33 W. Va. 159, 10 S. E. Rep. 375.

[8] 100 Pa. St. 551.

[9] Chase v. New York Mtg. Loan Co., 49 Minn. 111, 51 N. W. Rep. 816.

[10] Delano v. Rood, 6 Ill. 690.

[11] Ferguson v. Sutphen, 8 Ill. 547.

[12] Morgan v. Schermerhorn, 1 Paige (N. Y.), 544.

[13] Crim v. Post, 41 W. Va. 397, 23 S. E. Rep. 613.

[14] Wormley v. Hamburg, 46 Iowa, 144; Hathaway v. Hagan, 59 Vt. 75; Torrey v. Grant, 18 Miss. 89;

and it matters not whether the article transferred be land, goods or chattels.[15] As above stated the sale may be *bona fide* and not amenable to the charge of usury. In the case of Mosier v. Norton,[16] it was held that from the fact that one sells property and then loans to the purchaser the price paid for it, with other funds, usury is not to be presumed. So in a case where A, being unable to purchase B's land and pay for it as rapidly as B required, requested C to buy the land and let him have it; whereupon an agreement was made that C would buy the land for as cheap a price as he could and that A would pay him the sum of $900 for it. C purchased the land for $750 and conveyed it to A, who gave his note to C for $900. It was held that there was no agreement for the loan or forbearance of money, and therefore no usury.[17] In another illustrative case S inquires of G where he can raise money, whereupon G applies to B and B replies that he has no money to lend. Then G suggests that Virginia State stock would afford relief to S, to which B responds saying, that he might perhaps accommodate S, and G told S what B had said. Subsequently B causes the transfer of the required amount of stock, under the direction of S, who executes to B his bond for $11,000, payable three years after date with legal interest. The cash market value of the stock was $91 on the hundred, while its par value was altogether $11,000. This transaction was held to be a fair sale and not a device to cover a usurious loan of money.[18] It has long been the custom, approved by the courts, to sell negotiable instruments at a profit often exceeding lawful interest; and these sales are not usurious unless the instrument was created for the purpose of violating the usury statute.[19]

Question for Jury.—All these cases should properly be determined by the jury. It is hard to conceive of a case (although such is possible) where the parties would be either so ignorant or so negligent that in endeavoring to cover usury with the cloak of a sale they would allow the usurious terms to appear upon the face of the contract; in such a case, the question is for the court, but in referring to ordinary cases established by proof *aliundi*, the rule is as stated in Thurston v. Cornell,[20] as follows: "In all these cases we arrive at one result, viz., that the character of the transaction depends upon the intention of the parties, and that is a question for the jury." The face of the contract may indicate usury, yet the determination of the existence or non-existence of the element of usury, especially the element of intention, is nearly always properly for the jury.[21] Thus in Bass v. Patterson,[22] it was held that an agreement that the purchaser of goods should pay fifteen per cent. upon the prices charged for all goods not paid for within thirty days, was valid; the parties having intended that the fifteen per cent. should be a part of the original price, and that the question was properly submitted to the jury for determination.

Credit Sales.—The fact that in all business there exists a greater or less element of risk on all credits is recognized by the law. It has therefore been repeatedly held that it is not necessarily usurious to sell upon credit for a price higher than asked in cash.[23] Thus in the case of Graeme v. Adams,[24] the court said, upon this subject: "Usury can only attach to a loan of money, or to the forbearance of a debt. It is well settled that on a contract to secure the price or value of work and labor done, or to be done, or of property sold, the contracting parties may agree upon one price if cash be paid, and upon as large an addition to the cash price as may suit themselves, if credit be given; and it is wholly immaterial whether the enhanced price be ascertained by the simple

Fellows v. American Life Ins. & Trust Co., 1 Sandf. (N. Y.) Ch. 203; Brown v. Dewey, *Id.* 56.

[15] Starkweather v. Prince, 1 Mac Arthur, 144; Shanks v. Kennedy, 1 A. K. Marsh. (Ky.) 65; Siewert v. Hamel, 91 N. Y. 199; Campbell v. Nichols, 33 N. J. L. 81.

[16] 83 Ill. 519.

[17] Long v. Israel, 9 Leigh (Va.), 556.

[18] Brockenbrough v. Spindle, 17 Gratt. (Va.) 21.

[19] See Ingals v. Lee, 9 Barb. (N. Y.) 647; Billingsley v. State Bank, 3 Ind. 375; Young v. Miller, 7 B. Mon. (Ky.) 540.

[20] 38 N. Y. 281, citing Rose v. Dickson, 7 Johns. 196.

[21] Tarleton v. Emmons, 17 N. H. 43; Woolsey v. Jones, 84 Ala. 88, 4 South. Rep. 190; Ayrault v. Chamberlain, 32 Barb. (N. Y.) 229; Chase v. New York Mtg. Loan Co., 49 Minn. 111, 51 N. W. Rep. 816.

[22] 68 Miss. 310, 8 South. Rep. 849.

[23] Newkirk v. Burson, 28 Ind. 435; Hogg v. Ruffner, 1 Black, 115; First Nat. Bank v. Mann, 94 Tenn. 17, 27 S. W. Rep. 1015; Thompson v. Nesbit, 2 Rich. (S. C.) 73; Brooks v. Avery, 4 N. Y. 225; Farmers' Loan & Trust Co. v. Smith, 1 Clark (N. Y.), 540; Askin v. Lebus (Ky.), 4 S. W. Rep. 305.

[24] 23 Gratt. (Va.) 227.

addition of a lumping sum to the cash price, or by a percentage thereon. In neither case is the transaction usurious. It is neither a loan nor the forbearance of a debt, but simply the contract price of work and labor done and properly sold; and the difference between cash and credit in such cases, whether six, ten or twenty per cent., must be left exclusively to the contract of the parties; and no amount of difference fairly agreed upon can be considered illegal."

St. Louis, Mo. JAMES AVERY WEBB.

BUILDING CONTRACT — CONSTRUCTION — ARCHITECT'S CERTIFICATE — PERFORMANCE — QUESTION FOR JURY — SURETY OF CONTRACTOR—LIABILITY—DISCHARGE.

WELCH v. HUBSCHMITT BUILDING & WOODWORKING CO.

Supreme Court of New Jersey, November 8, 1897.

1. The parties to a building contract are legally bound by a provision that the decision of the architect shall be final and conclusive, subject, however, to the implied condition that the decision shall be an honest one.

2. Construing the contract clause and the specification clause together in this case, the conclusiveness of the architect's certificate extends only to the plans, the style, the measurements, and the way in which the building shall be constructed. The workmanship and materials with respect to their character and quality must, under the specification clause, have the approval and acceptance of the owner and architect.

3. Whether, in the exercise of a fair and reasonable judgment, the owner and architect should approve and accept, is a question for the jury.

4. By paying a part of the second installment before it was due under the contract, the owner discharged the surety of the contractor from all obligation.

5. Under the contract set forth in the certified case, if, on account of the default of the contractor, the owner completed the contract work, he had a right of recourse to the surety for any excess of reasonable cost over the contract price.

VAN SYCKEL, J.: The first question submitted to this court is whether the decisions of the architect, made during the progress of the work, that any portions of the workmanship or materials were not according to the drawings and specifications, are final and conclusive. The fifth clause of the contract reads as follows: "Should any dispute arise respecting the construction or meaning of the drawings or specifications, the same shall be decided by the said architect, and his decision shall be final and conclusive." Part only of the specifications are contained in the certificate before us, and in that part is the following language: "The entire work to be done and finished in every part in a good, substantial, workmanlike manner, according to the accompanying drawings and these specifications, to the full extent and meaning of the same, and the entire satisfaction, approval, and acceptance of the owner and architect." In Chism v. Schipper, 51 N. J. Law, 1, 16 Atl. Rep. 316, it was conceded that parties to a building contract are legally bound by a provision that the decisions of the architect shall be final and conclusive on questions whether work done in the course of the erection of the building is within the specifications or not, subject, however, to the implied condition that the decision shall be an honest one. The case, as certified, does not advise us whether the architect's certificate relates to matters within the contract clause, or to those within the specification clause, above recited. These clauses must be construed together, proper effect being given to each clause. The contract clause applies, by its terms, to disputes respecting the true construction and meaning of the drawings and specifications. It limits the finality of the architect's certificate to the construction of the drawings and specifications. The utmost effect that can be given to his certificate under this language is that it shall be conclusive as to the plans, the style, the measurements, and the way in which the building shall be constructed. But the workmanship and materials, with respect to the character and quality, must, according to the specification clause, have the approval and acceptance of the owner and the architect. The defendant cannot be concluded as to these matters by a certificate of the architect. Whether, in the exercise of a fair and reasonable judgment, the owner and architect should approve and accept the work and materials, is a question which the defendant has a right to submit to the jury. In answer, therefore, to the first question, the circuit court is advised that, if the certificate of the architect relates to matters within the contract clause as above interpreted, it is final and conclusive; otherwise it is not final.

The second question to be answered is "whether, by paying part of the second installment before it was due, the owner discharged the surety from all obligation, or only from obligation with respect to the work which the contract required to be finished in order to render the installment due." It is well-settled law that a surety, on paying a debt, is entitled to stand in the place of the creditor, and be subrogated to his rights; and he is entitled to the benefit of the securities received by the creditor from the principal debtor. King v. Baldwin, 2 Am. Lead. Cas. 4; De Col. Guar. & Sur. 36, 438, 439, and cases cited. In Calvert v. Dock Co., 2 Keen, 638, the court, after stating the rule to be that, if the surety pays the debt, he is entitled to all the securities possessed by the creditor, says the question always is whether what has been done lessens that security. The second payment, as appears by the contract, was to be $785, to be paid when the house was inclosed, verandas finished except-

ing outside steps, and the blinds hung. So far as appears in the certificate, the work to be done before the second payment was earned never was done by the contractor. The owner held in his hands a sum representing the value of that work so far as it had been completed by the contractor, which sum was, in effect, a security in the hands of the owner that the contract work could be completed for the price agreed upon. The owner could have held and applied it to paying for the completion of the building. The payment of it to the contractor when he had no legal claim to it under his contract operated to the direct prejudice of the surety. It diminished the security which the owner had, and which he should have availed himself of, as in the case of a surety, and thereby the surety was discharged from all obligation. Any material alteration in the terms of the contract will release the surety, without regard to the extent of the injury to the surety. He has a right to stand upon the very terms of the contract. Warden v. Ryan, 37 Mo. App. 466; Judah v. Zimmerman, 22 Ind. 388; Mayhew v. Boyd, 5 Md. 102; Johnston v. May, 76 Ind. 293; Brandt, Sur. § 397. A surety on a building contract, where the principal is to be paid by installments, is discharged if the principal is paid faster than the contract provides. Navigation Co. v. Rolt, 95 E. C. L. 550; Calvert v. Dock Co., 2 Keen, 638. And a discharge will be created by a departure from the terms of the contract respecting payments, though no injury is shown. Simonson v. Grant, 36 Minn. 439, 31 N. W. Rep. 861; Ryan v. Morton, 65 Tex. 258. In this State it is held that a valid agreement between the holder of the note and the maker to extend the time of payment will discharge the surety who is not a party to such agreement, and this rule in no wise depends upon the extent to which the surety may be prejudiced. Nightingale v. Meginnis, 34 N. J. Law, 461.

The third question submitted is "whether, if the contractor refused or neglected to supply," etc., "and on that account the owner, after three days' notice, prevented the contractor from proceeding with the work, and himself completed the building, he can recover from the surety the reasonable expense of completion above the unpaid part of the contract price, in view of the express provision that he may deduct the expense from the price." The provision to which reference is made in this question was manifestly inserted to permit the owner, in case he could complete the building for a sum equal to or less than the contract price, to deduct the cost from the contract price. It was not intended to deprive the owner of the right of recourse to the surety for any excess of reasonable cost over the contract price.

The remaining question certified is "whether, this being a suit on the bond, the contractor can legally claim a judgment against the owner for damages occasioned by the owner's wrongfully preventing the contractor from completing the work." The right of the defendant contractor to set up such a claim in the same suit is given by the act of 1896 (page 185) in cases where that act applies, provided a notice of the particulars of such claim be annexed to the plea, and filed therewith. The pleadings are not contained in the certificate, and, as it does not appear that the required notice was filed by the defendant, this question must be answered in the negative. The Passaic circuit court should be advised in accordance with the views hereinbefore expressed.

NOTE.—*Recent Decisions Involving Conditions in Building Contracts as to Architects' Certificates.*—Where a building contract provides that all estimates of extra material and labor furnished and performed by the contractor shall be estimated by the architect, and that the estimate shall be binding on the parties, it is a fraud on the contractor if the architect does not make a fair allowance for the extra work and material, and makes an estimate for which there is no substantial basis, and in such case the contractor is not bound by the estimate. Anderson v. Imhoff (Neb.), 51 N. W. Rep. 854. A building contract provided that the owner should pay the contractor "upon the presentation of certificates," signed by the architect, and that the decision of the architect as to the value of extra and deducted work, and stating the balance due from the owner, which certificate the contractor gave back to the architect, who afterwards refused to give him any further certificate. Held, that the contractor was entitled to recover said balance from the owner, although he had not presented him with the certificate. Arnold v. Bournique (Ill. Sup.), 33 N. E. Rep. 530. Where a building contract provides that the work shall be under the supervision of an architect; that all work shall be subject to his examination; that all payments are to be made on estimates fixed by the architect; and that no money shall be due and payable unless certified to be due by him,—a certificate by the architect to the contractor showing that the former is satisfied that the materials and work are in compliance with the contract, is binding and conclusive on the owner, unless he can show fraud in its procurement, or such gross mistake as would amount to fraud were it permitted to prevail. Wilcox v. Stephenson (Fla.), 11 South. Rep. 659, 30 Fla. 377. Where it is stipulated in a contract for the erection of a house that it shall be built according to the plans, and to the "satisfaction" of the architect, his certificate that he accepts the work as done in accordance with the plans and specifications is conclusive on the owners, and cannot be contradicted by them. Kennedy v. Poor, 25 Atl. Rep. 119, 151 Pa. St. 472, 31 W. N. C. 174. Where an architect is, by the building contract, made the sole arbiter between the parties of matters concerning materials and character of work, the exercise of his judgment on such matters will be binding on both parties, unless fraud is pleaded and proved. Wright v. Meyer (Tex. Civ. App.), 25 S. W. Rep. 1122. Though a building contract provided that any dispute as to the construction of the specifications should be decided by the architect, his letter to the contractor, at a time when there had been no dispute as to the specifications in regard to the mixing of the plaster, complaining of the manner in which the work was being done, and directing him to follow the superintendent's instructions, does not authorize him to follow instructions of the superintendent directing a mixture for plaster inferior to that fixed by the specifications. Fitzgerald v. Moran, 36 N. E. Rep. 508, 141 N. Y. 419. Where a

building contract stipulates that the materials shall be of a certain quality, and that the work shall be performed in the best manner, subject to the acceptance or rejection of the architect, all to be done in strict accordance with the plans and specifications, and to be paid for when done completely and accepted, the acceptance by the architect of a different class of work or of different materials will not bind the owner, as the provision for the acceptance by the architect is merely an additional safeguard for the benefit of the owner. Lewis v. Yagel, 28 N. Y. S. 833, 77 Hun, 337. A building contract provided that part of the contract price should be paid as the work progressed, and the balance when the work was completed and accepted, and that payments should be made in accordance with the architect's certificate. Held, that the architect's certificate was required only as to the payments to be made as the work progressed, and not to the final payment after completion of the work. Oberlies v. Bullinger, 27 N. Y. S. 19, 75 Hun, 248. A provision in a building contract that, in case of the contractor's failure to perform his agreements, the architect shall audit and certify the consequent damages and expense to the owner, and that the architect's certificate shall be conclusive, is valid and binding. Eldridge v. Fuhr, 59 Mo. App. 44. A provision in a building contract that, should any dispute arise respecting the true construction or meaning of the drawings or specifications, the matter should be decided by the architect, and that his decision should be final and conclusive, gives the architect the power to dispense with requirements contained in the specifications. Duell v. McGraw (Sup.), 33 N. Y. S. 528, 86 Hun, 331. Under a building contract providing that payment shall be made on presentation of a certificate by the architect, the refusal of the architect to give a certificate unless he be allowed to pass upon matters not within his authority waives the necessity of a certificate. Frost v. Rand, McNally & Co., 51 Ill. App. 276. A provision in a contract that the report of an engineer, inspector, or arbiter as to the amount and quality of the work done or material furnished under a contract shall be conclusive upon the parties to the agreement is a legal stipulation, and can only be set aside for fraud or for such gross mistakes as imply bad faith or a failure to exercise an honest judgment. Elliott v. Missouri, K. & T. Ry. Co. (C. C. A.), 74 Fed. Rep. 707. When the parties to a contract for the performance of work or the furnishing of material agree that the report of an inspector or arbiter as to the amount and quality of work done or material furnished shall be conclusive, the report of such inspector or arbiter is as conclusive upon questions of count, measurement, or distance as upon other matters, although these questions may be capable of accurate measurement. Elliott v. Missouri, K. & T. Ry. Co. (C. C. A.), 74 Fed. Rep. 707. Where a contract for tiling a farm provides that payment shall be made when the work is accepted by the surveyor supervising the same, the decision of the surveyor is binding in the absence of fraud or mistake on his part. Classen v. Davidson, 59 Ill. App. 106. A contract to make the excavation for a building under the instructions of an architect is performed, if the work is done as required by the architect, and to his approval, whether in conformity to the drawings made or not. Smith v. Farmers' Trust Co. (Iowa), 66 N. Y. Rep. 84. Plaintiff contracted to furnish stone to a contractor for the erection of a federal building, which was to be paid for when accepted by the superintendent in charge. Held, that the fact that his contract also required the stone to be cut according to the plans and specifications of the contract for the erection of the building, and that that contract required the contractor to furnish stone in every way acceptable to the supervising architect of the building, did not make the price of the stone furnished by plaintiff payable only on the stone being accepted by the supervising architect. Nevin v. Craig (Minn.), 65 N. W. Rep. 86. Under a contract for work on a railroad, providing that payments by the railroad company should be made on estimates by its engineer in charge of the work, such estimates are conclusive as to the amount payable, unless it appears that they are infected with fraud, gross error or mistake. Mackler v. Mississippi R. & B. T. R. Co., 62 Mo. App. 677. A provision in a building contract referring to the architect "all disputes . . . and all questions of doubt as to the tenor and intention of the drawings and specifications, or of the contract," embraces the question whether the contractor and his sureties are bound to refund to the owner of the building the amount paid by him on a mechanic's lien, where the contract provides that the contractor shall deliver the building free from all claims, and shall furnish at his own cost all necessary materials. Barclay v. Deckerhoff, 33 Atl. Rep. 71, 171 Pa. St. 378. The architect is not disqualified to act as referee, as provided by a building contract, because, prior to so acting, he was called as a witness in an action between the parties involving the matter in dispute. Barclay v. Deckerhoof, 33 Atl. Rep. 71, 171 Pa. St. 378. Where the owner and a building contractor have agreed that payments shall be made as the work progresses on estimates to be made by the architect, such estimates have the force of findings between the parties, and are binding on them unless impeached for fraud. Kilgore v. Northwest Texas Baptist Educational Society (Tex. Sup.), 35 S. W. Rep. 145. Where a building contract provides that payment shall only be made on the architect's certificate, it is not a sufficient excuse for failure to procure such certificate that the contractor feared to apply for it because he believed the architect to be fraudulently prejudiced against him. Gilmore v. Courtney (Ill. Sup.), 41 N. E. Rep. 1023, 158 Ill. 432.

CORRESPONDENCE.

THE INDIANA "THREE CENT" CAR FARE LITIGATION.

To the Editor of the Central Law Journal:

There is too much misinformation conveyed in your editorial article on the Indianapolis Three Cent Fare Case, published in last week's CENTRAL LAW JOURNAL, to pass unchallenged. After stating correctly Judge Showalter's decision, and the reasons upon which that decision was based, you say that "the court of appeals now affirm the decision of Judge Showalter, awarding an injunction asked for by the mortgagees." The court of appeals did nothing of the kind. From Judge Showalter's order overruling a motion to dissolve the temporary restraining order theretofore granted by him, an appeal was taken by the city to the circuit court of appeals for the seventh circuit. A motion was made by the appellee to dismiss the appeal, because of an alleged lack of jurisdiction in that court, it being claimed that section 7 of the Evarts Act, under which the appeal was taken, did not confer jurisdiction upon the circuit court of appeals in such a case. The only question presented to, or decided by, the court, was the question of jurisdiction, and the appeal was dismissed because, as it

was held, there was no jurisdiction in the court to determine the questions involved. It is, therefore, putting it rather strong to say that Judge Showalter's decision "has recently been upheld by the United States Circuit Court of Appeals," or that "the court of appeals now affirms the decision of Judge Showalter," when that court expressly declined, for want of jurisdiction, to examine the merits of the case at all.

Indianapolis, Ind. JOHN W. KERN.

BOOK REVIEWS.

AMERICAN STATE REPORTS, VOL. 56.

This volume contains reports of many valuable cases. Among them is Smith v. San Francisco & North Pacific Ry. Co. (Cal.), to which is appended an exhaustive note on Agreements to Control the Future Voting of Stock at Corporate Elections; Baltimore, etc. Ry. Co. v. Schales (Ind.), on Architect's Certificates and Engineer's Estimates; McCall v. Hampton (Ky.), on Assignment of Expectancies; Harris v. Murphy (N. Car.), on Subsequent Parol Agreement to Vary a Writing; Southern Building & Loan Assoc. v. Dawson (Tenn.), on the Liabilities of Owners of Elevators used for Passengers or Employees; Stout v. Phillipi Manufacturing, etc. Co. (W. Va.), on the Law of Lis Pendens. Each of the above cases is accompanied by a long note. This valuable series of reports is published by Bancroft-Whitney Co. San Francisco.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACTION—Jurisdiction of Courts — Negligence.—An action for damages for negligently causing death may be maintained in other jurisdictions than that in which the cause of action arose, where the statutes giving the right of action are not inconsistent with the statutes or public policy of the jurisdiction in which the suit is brought.—STEWART V. BALTIMORE & O. R. CO., U. S. S. C., 18 S. C. Rep. 105.

2. ADMINISTRATION.—Where, on the death of a minor, his guardian is appointed as one of his administrators, and thereafter continues to hold the assets of his estate, such continued holding is as administrator, and not as guardian. His right and duty to account as guardian do not affect the title to the property on the death of the ward.—HARRISON V. PEREA, U. S. S. C., 18 S. C. Rep. 129.

3. ADMINISTRATION—Claims of Fourth Class.—A final order of the probate court, made under Laws 1885, p. 27, directing an administrator in final settlement of an estate to deliver certain described notes to a trustee for collection, and the distribution of their proceeds, is not a final judgment against said administrator for the amount of the notes. Consequently the claim of the trustee against the estate of the administrator, who died without delivering the notes, was not one of the fourth class, under Rev. St. 1889, § 183, providing that judgments against the deceased in his lifetime are claims of the fourth class.—RUTLEDGE V. SIMPSON'S ADMR., Mo., 42 S. W. Rep. 820.

4. ADMINISTRATION — Set Off.—Pub. St. ch. 136, which provides that a debt due a decedent from one of his heirs, devisees, legatees, or distributees may be set off against the share or claim of such heir, devisee, legatee, or distributee, does not empower the probate court to order land devised or inherited to be sold to pay a debt due the estate.—JONES V. TREADWELL, Mass., 48 N. E. Rep. 339.

5. ADMIRALTY JURISDICTION — Maritime Liens.—The sole essentials of admiralty jurisdiction in a suit *in rem* for breach of contract are that the contract is maritime, and that the property proceeded against is within the lawful custody of the court. The existence of a maritime lien is not jurisdictional, but is a matter going to the merits.—THE RESOLUTE, U. S. S. C., 18 S. C. Rep. 112.

6. ALIENS—Right to Inherit Land.—Article 6 of the treaty of April 3, 1783, between the United States and Sweden, as revived in article 17 of the treaty of July 4, 1827, between the same powers, provides that the subjects of the contracting parties may "dispose of their goods and effects" by donation or otherwise, and that "their heirs shall receive the succession even *ab intestato*," and that "these inheritances," shall be exempt from certain charges: Held, that the word "effects" (represented in the French draft of the treaty by the word "biens," which, in civil law, includes immovables as well as movables), when construed with the words "heirs," "successions," and "inheritances," includes real as well as personal property; so that an alien resident of Sweden may inherit land from a resident citizen of Illinois, notwithstanding Laws 1887, p. 5, forbidding it.—ADAMS V. AKERLUND, Ill., 48 N. E. Rep. 455.

7. APPEAL BOND—Construction.—An appeal bond in a contempt case was conditioned that the appellant, in case of affirmance, should "surrender himself to the custody of the sheriff, or pay the sum of $7,500, within ten days after such affirmance:" Held that a surrender to the sheriff within 10 days after a petition for rehearing was overruled, but more than 10 days after judgment of affirmance was entered, did not satisfy the condition of the bond.—KLEIN V. BOYD, Ill., 48 N. E. Rep. 475.

8. APPEAL BOND—Joint Obligation.—In an action on the official bond of a county treasurer, judgment was rendered against both principal and sureties. Defendants gave an appeal bond, conditioned to perform the judgment of the reviewing court, and pay all such damages as said court should award. The reviewing court reversed the judgment against the sureties, but affirmed it as to the principal, as his liability was

shown independently of the bond, and entered judgment against him and the sureties on the appeal bond for the sum adjudged below and all costs of the appeal: Held, that judgment was properly rendered against the sureties on such appeal bond, as their undertaking was several as to each of such appellants.—McFARLANE v. HOWELL, Tex., 42 S. W. Rep. 853.

9. ASSIGNMENT FOR BENEFIT OF CREDITORS.— Sanb. & B. Ann. St. § 1693*a*, provides that an execution levy made under a judgment confessed against an insolvent debtor within 60 days prior to an assignment for creditors, or a judgment entered on a note by such debtor within said period, shall be void: Held, that an execution levy made under a judgment entered within 60 days prior to the assignment on a judgment note given by the assignor more than 60 days prior to such assignment is valid.—SECOND WARD SAV. BANK MILWAUKEE v. SCHRANCK, Wis., 73 N. W. Rep. 31.

10. ATTORNEYS—Compensation—Contracts.—Though recovery in a damage suit is dependent upon the result of pending criminal litigation against plaintiff in such suit, a contract for compensation for services in the damage suit does not, as a matter of law, include services rendered in assisting in the defense of the criminal proceedings.—GORRELL v. PAYSON, Ill., 48 N. E. Rep. 433.

11. BANKS—Insolvent Bank—Following Trust Funds.—Conceding, without deciding, that plaintiff stood in a fiduciary relation to the insolvent, and that certain funds which came to the hands of the latter were trust funds which it held as trustee for the former, held plaintiff has not traced these funds into the hands of the receiver of the insolvent, and is not entitled to a preference over the other creditors of the insolvent.—IN RE IRISH-AMERICAN BANK, Minn., 73 N. W. Rep. 6.

12. BANKS AND BANKING—Checks — Set-off.—Where a notary public took a check to a bank during banking hours for the purpose of demanding payment, and, finding the bank's doors closed, went to the president, and demanded payment of him, there was a sufficient presentment. A bank, having on deposit funds sufficient to pay the same, cannot refuse to pay a check presented by a *bona fide* holder, though the maker owes the bank on an overdue note more than the amount of his deposit, unless such note has been charged against such deposit before presentment of the check.—NIBLACK v. PARK NAT. BANK OF CHICAGO, Ill., 48 N. E. Rep. 438.

13. BENEVOLENT SOCIETY — Insurance—Certificate.—The laws of a fraternal benefit order provided that a benefit certificate might be surrendered at any time, and a new certificate issued, payable to such beneficiary as the member might designate; and that, if a certificate was lost, or beyond a member's control, he might, in writing, surrender all claim thereto, and that a new certificate might be issued: Held that, where a member pledged a certificate of $3,000 to his wife for a loan of $1,500, she obtained an equitable interest therein, which could not be devested by his subsequent conduct in making affidavit that the certificate was lost, and procuring the issuance of a new certificate to his daughters.—SUPREME COUNCIL ROYAL ARCANUM v. TRACY, Ill., 48 N. E. Rep. 401.

14. BENEVOLENT SOCIETY—Mutual Benefit Insurance.—A member of a mutual benefit insurance order, whose certificate is conditioned on compliance with all the laws of the order then in force or that might thereafter be adopted, is bound by a by-law, adopted after his admission, providing that, if any member engage in any prohibited occupation after admission, he shall stand suspended, and that no action of the order shall be a condition precedent to such suspension, and that the receipt of assessments shall not be a waiver of his engaging in such occupation.—SCHMIDT v. SUPREME TENT OF KNIGHTS OF MACCABEES OF THE WORLD, Wis., 73 N. W. Rep. 22.

15. BILLS AND NOTES — Failure of Consideration.—Where a note was given in fulfillment of a subscription in aid of a street railway, the fact that the company did not fulfill all of the obligations contained in the subscription agreement shows but a partial failure of consideration, and is insufficient to support a judgment for defendant.—BREVOORT v. HUGHES; Colo., 50 Pac. Rep. 1050.

16. BILLS AND NOTES — Proof of Ownership.—In an action by the indorsee of a note, the production of the note on the trial, showing indorsement by the payee to plaintiff, is sufficient proof of ownership, in the absence of a specific denial, or of evidence on the part of defendant controverting such fact, to justify the direction of a verdict for plaintiff.—SOLOMON v. BRODIE, Colo., 50 Pac. Rep. 1045.

17. BROKERS — Right to Commissions.—Though a brokerage contract provides that the commission is payable *pro rata* out of the installments of the price to be deposited by the purchaser, and time is of the essence of such deposits, failure of the purchaser to deposit such installments in time does not forfeit commissions payable therefrom, where the vendor waives such failure, and thereafter, without the broker's consent, makes a new contract, by which a cash payment is accepted in lieu of the unpaid installments.—BISHOP v. AVERILL, Wash., 50 Pac. Rep. 1024.

18. BUILDING AND LOAN ASSOCIATIONS — Usury. — Though Shannon's Code, § 3504, authorizes usury paid to be recovered by the borrower from the party receiving it, yet a shareholder who, having borrowed money from a building and loan association, upon satisfactory terms, and without suspicion that the transaction was *ultra vires*, has discharged his obligation, and receives in full settlement upon his withdrawal from the association a sum which includes his interest in the profits, partly earned from usurious dealings with himself and others, cannot recover the usurious interest paid by him.—STAR SAVINGS & LOAN ASSN. v. WOODS, Tenn., 42 S. W. Rep. 872.

19. CARRIERS—Passenger — Contributory Negligence.—A passenger who sits by an open window with knowledge of the fact that sparks and cinders are entering the window cannot recover for injuries resulting therefrom, on the ground that the company was negligent in allowing the window to be out of repair, so that it could not be closed, if he knew, or by the exercise of ordinary care could have known, that there were unoccupied seats with protected windows. — O'DONNELL v. LOUISVILLE & N. R. CO., Ky., 42 S. W. Rep. 846.

20. CHATTEL MORTGAGES—Possession of Mortgagee.—On an issue as to the sufficiency of the mortgagee's possession to give validity to a mortgage not filed, a nonsuit was properly refused where the mortgagee took possession of the stock of goods, caused an inventory to be taken, opened new books, proceeded to convert the goods into money, received the proceeds of the sales, paid the expenses, and visited the store every day, though he employed one of the mortgagors and the husband of the other in the store, and did not change the sign over the door.—SCHNEIDER v. KRABY, Wis., 73 N. W. Rep. 61.

21. CHATTEL MORTGAGE — Retention of Possession — Fraud.—Fraud in a mortgage allowing a mortgagor to retain possession, with "full use and enjoyment," of the goods, until default, authorizes the court, without regard to extrinsic facts, to declare it void as to creditors of the mortgagor.—LUTZ v. KINNEY, Nev., 50 Pac. Rep. 1031.

22. CONSTITUTIONAL LAW — Jurisdiction of Supreme Court.—The fact that a party, in stating his claim of title, alleges that he will rely on certain written evidences of title, enumerating among them a treaty between the United State and a foreign country, and also the fifth amendment to the federal constitution, will not give the supreme court jurisdiction of a writ of error direct to the circuit court, under the fifth section of the act of March 3, 1891, where at the trial no right, title, privilege, or immunity was asserted to have been

derived either from the treaty or the constitution, and no question as to the application or construction of the constitution, or the validity or construction of the treaty, was decided by the court.—MUSE V. ARLINGTON HOTEL CO., U. S. S. C., 18 S. C. Rep. 109.

23. CONTRACTS — Bottomry Bonds. — In determining whether there is such an ambiguity in a contract as leaves any room for a construction thereof by the court, no particular words can be segregated from the context, and affirmed to be without ambiguity, but the whole contract must be brought into view, and interpreted with reference to the nature of the obligation between the parties, and the intention which they manifested in forming it. This rule is especially applicable in construing a bottomry bond, as admiralty courts act upon enlarged equitable principles. — O'BRIEN V. MILLER, U. S. S. C., 18 S. C. Rep. 140.

24. CONTRACT—Duress. — While the compromise of a claim asserted upon the one side but questioned upon the other will be deemed a sufficient consideration to support an agreement to pay such claim, it is still essential that the claim so asserted should have some basis upon principles of law or equity. Where one, under the influence of threats or persuasion, and for the purpose of avoiding a present or threatened embarrassment, agrees to pay or recognize a claim which has no foundation either in equity or law, such agreement is without consideration, and void. — VANE V. TOWLE, Idaho, 50 Pac. Rep. 1004.

25. CONTRACT — Pleading and Proof. — Recovery for work done for a city under a contract, making conditions precedent to recovery that it be done under the supervision of, and paid for on estimates made by, the city engineer, and that the estimates be approved by the commissioner of public works, cannot be had under a complaint, the theory of which is that plaintiff fully complied with its contract on its part, where the evidence is on the theory that, though the work was not done under the supervision of the engineer, and no estimates had been made or approved, this was because of the "captiousness and fraudulent conduct" of said city officers.—CITY OF PEORIA V. FEUIN-BAMBRICK CONST. CO., Ill., 48 N. E. Rep. 435.

26. CONTRACTS—Public Policy—Railway Franchise.—It would seem that two parties, who have made separate applications to a city council for the grant of a street-railway franchise, may make a contract to unite their interests, and mutually co-operate to secure the franchise in the name of one of them, without contravening any rule of public policy, where the fact of such union of interests is disclosed to the city council and to all parties interested. — HYER V. RICHMOND TRACTION CO., U. S. S. C., 18 S. C. Rep. 115.

27. CORPORATIONS — Contracts between. — A note executed by one corporation to another is not *prima facie* void, though the same person is president of both companies. — ST. JOE & M. F. CONSOL. MIN. CO. V. FIRST NAT. BANK OF ASPEN, Colo., 50 Pac. Rep. 1055.

28. CORPORATIONS — Insolvent Corporation — Illegal Preference. — An insolvent corporation mortgaged all its property for the benefit of one of its creditors, who thereupon allowed it to continue in business, though he knew it was insolvent: Held that, although there was no fraud in fact, the mortgage was illegal as against creditor; even subsequent ones. — COOK V. MOODY, Wash., 50 Pac. Rep. 1020.

29. CORPORATIONS — Validity of Incorporation — Estoppel.—A stockholder who has acted as director is estopped from disputing the validity of the incorporation.—CURTIS V. MEEKER, Ill., 48 N. E. Rep. 399.

30. COUNTY OFFICERS—Assistants' Salary.—Inasmuch as Const. art. 10, § 10, providing generally for the payment of county officers and their assistants out of the fees of the office, has a proviso, "except as provided by section 9 of this article," the compensation of Cook county officers and their assistants, being provided for in said section 9, is not controlled by section 10.—COOK COUNTY V. HARTNEY, Ill., 48 N. E. Rep. 458.

31. CREDITORS' BILL—Multifariousness.—A creditors' bill, uniting claims against the president and other stockholders of an insolvent corporation for their unpaid subscriptions with claims against the president for his individual fraud in converting corporate funds, and committing wanton waste on plaintiff's property, while acting as such president, is demurrable for multifariousness.—MONTSERRATT MIN. CO. V. JOHNSON COUNTY COAL MIN. CO., Mo., 42 S. W. Rep. 822.

32. CRIMINAL LAW — Assault with Intent to Rape.—A conviction for assault with intent to commit rape cannot be sustained when it appears that defendant, on being told that, if he attempted to come into the room, his head would be cut open with an ax, left the premises, and did not return.—STATE V. HAYDEN, Mo., 42 S. W. Rep. 826.

33. CRIMINAL LAW — Judgment and Sentence. — It is error for the trial court to fail to inform defendant, before passing sentence upon him, of the nature of the indictment, his plea, and the verdict, and to fail to state in the judgment or sentence the crime of which defendant has been convicted; but the only effect of such errors would be to require defendant to be returned to the court wherein convicted, for proper judgment and sentence, and in this case such a requirement would be prejudicial to him. — RHEA V. UNITED STATES, Okla., 50 Pac. Rep. 992.

34. CRIMINAL LAW — Larceny. — Evidence that goods were delivered to defendant by the owner, to be shipped to a specified person, title not to pass until a draft for the price on such person was paid; that the defendant shipped the goods elsewhere, and sold them; and that the draft was not paid, — is sufficient to convict defendant of larceny.—HOUSH V. PEOPLE, Colo., 50 Pac. Rep. 1036.

35. CRIMINAL LAW — Reasonable Doubt. — To define "reasonable doubt" as "an intelligent opinion or conviction" that defendant's guilt has not been satisfactorily proven is prejudicial error, as tending to minimize the significance of a mere doubt, not amounting to intelligent conviction. — HOFFMAN V. STATE, Wis., 73 N. W. Rep. 51.

36. CRIMINAL LAW — Robbery — Instruction. — An instruction to the jury, defining robbery, which omits the word "feloniously" as to the taking of the property, is prejudicial error; nor is the same cured by the subsequent instruction: "It is not necessary, to find a verdict, that the money or property was taken from the person of another, but, if you find that the money or property was taken feloniously from the immediate presence of another," etc.—STATE V. OLIVER, Mont., 50 Pac. Rep. 1018.

37. CRIMINAL LAW—Robbery — Variance.—There is no variance between the indictment charging robbery "from the person" and the evidence showing a robbery "in the presence."—STATE V. LAMB, Mo., 42 S. W. Rep. 827.

38. DECEIT — Fraud — Representations.—An instruction that a misrepresentation regarding a transaction would give a right of action to the aggrieved party, provided there was at the time a fiduciary relation between the parties, is not objectionable as against such aggrieved party, as it not only states the law correctly, as far as it goes, but does not go far enough against him, since it omits the essential element that such misrepresentation must have been relied upon. — ALEXANDER V. EMMETT, Ill., 48 N. E. Rep. 427.

39. DEED—Advancements—Requisites.—Under Rev. St. ch. 39, § 7, providing that "no gift or grant shall be deemed to have been made in advancement unless so expressed in writing, or charged in writing by the intestate as an advancement, or acknowledged in writing by the child or other descendant," a conveyance of land by a father to sons will not be considered as an advancement, without a written instrument to that effect, notwithstanding the oral admissions and declarations clearly show that an advancement was intended.—BARTMESS V. FULLER, Ill., 48 N. E. Rep. 452.

40. DEED — Assumption of Mortgage. — Errors assigned, but not argued, are waived. Where a grantee, claiming that a clause requiring the assumption of a mortgage was fraudulently and without his knowledge inserted in the deed, failed to disaffirm it for 10 months after notice of the fraud, until suit was brought by the mortgagee, he is estopped to set up the fraud.—SUTTER v. ROSE, Ill., 48 N. E. Rep. 411.

41. EASEMENT—Establishment by User.—Where an alley has been used continuously for a period of more than 20 years by the public, with little or no interruption, such user is sufficient to create an easement.—CITY OF CHICAGO v. HOWES, Ill., 48 N. E. Rep. 408.

42. ELECTION OF REMEDIES — What Constitutes.—Where one creditor of an insolvent brings an action against other creditors to enforce alleged rights under certain transfers by the insolvent, he cannot change his bill into a creditors' bill to set aside such conveyances for fraud, two years after learning all the material facts tending to establish the alleged fraud.—HILDEBRAND v. TARBELL, Wis., 73 N. W. Rep. 53.

43. EMINENT DOMAIN—Taking Railroad Property for Street.—A city may condemn railroad land to be used as a street, though such use would be inconsistent with the use that had been made by the railroad company. City and Village Act, art. 5, § 1, par. 89, authorizing a city to condemn railroad land for street purposes, and Const. 1870, art. 11, § 14, providing that the power of eminent domain should never be abridged, so as to prevent the taking of the property and franchises of incorporated companies.—CHICAGO & A. R. CO. v. CITY OF PONTIAC, Ill., 48 N. E. Rep. 485.

44. EMINENT DOMAIN—Trespass—Damages.—Rev. St. ch. 47, § 10, provides, with reference to proceedings to condemn lands for the use of the sanitary district of Chicago, "that the judge of the court shall upon such report (of the jury) proceed to adjudge, and make such order as to right and justice shall pertain, that petitioner enter upon such property and the use of the same, upon payment of full compensation as ascertained as aforesaid, and such order with evidence of such payment shall constitute complete justification of the taking of such property:" Held, that such order is an adjudication of all damages resulting from the taking of the lands, and the original landowner cannot afterwards bring an action to recover damages, in trespass *quare clausum fregit*, for taking possession of the condemned property, and tearing down structures thereon.—ALLEN v. HALEY, Ill., 48 N. E. Rep. 478.

45. FORCIBLE ENTRY AND DETAINER—Title.—Where plaintiff, in an action for forcible entry and detainer, under the statute providing that a person entitled to the possession of land may bring such action against one who, without any right or title, has entered upon such land while it was unoccupied, sets up a right to possession derived from his grantor, defendant must attack that right, and not attempt to try the title.—PALMER v. FRANK, Ill., 48 N. E. Rep. 426.

46. FRAUDS, STATUTE OF—Agreement to Answer for Another's Debt.—A parol agreement between plaintiff and defendant, who held the note of an insolvent secured by mortgage, that if defendant would indorse said note to plaintiff without recourse, and pay a certain sum, and cause the insolvent to convey to plaintiff the interest covered by the mortgage, plaintiff would deliver certain property to defendant, is not a promise by defendant to answer for the debt or default of the insolvent.—BOOS v. HINKLE, Ind., 48 N. E. Rep. 383.

47. FRAUDULENT CONVEYANCES.—Where the record fails to show whether or not the debts due the execution creditors were contracted before or after the date of an alleged fraudulent transfer by the debtor to his wife of his property, held, that such creditors should be regarded as subsequent creditors with reference to such transfer.—JOHNSON v. JONES, Kan., 50 Pac. Rep. 983.

48. FRAUDULENT CONVEYANCES.—A chattel mortgage to secure a *bona fide* debt is not fraudulent, though the mortgagee knows it is given with intent to defraud other creditors, unless he participates in that intent.—KOCH v. PETERS, Wis., 73 N. W. Rep. 25.

49. FRAUDULENT CONVEYANCES — Assignment for Benefit of Creditors.—Under Acts 1881, ch. 121, providing that trust deeds, etc., taken within three months of a general assignment, and in contemplation of it, shall be void, a general assignment which was void because not in conformity to such act does not render invalid conveyances made within such time, in contemplation of such assignment.—JONES v. CULLEN, Tenn., 42 S. W. Rep. 873.

50. FRAUDULENT CONVEYANCES—Consideration—Creditors.—A creditor may in good faith take a mortgage from his debtor to secure a *bona fide* debt, or accept property at a fair valuation in satisfaction of the debt, though he knows the conveyance is made with intent to defraud other creditors, if he does not participate in that intention.—CAREY v. DYER, Wis., 73 N. W. Rep. 29.

51. FRAUDULENT CONVEYANCES—Rights of Grantee.—Where a fraudulent grantee is devested of his title by sale of the land on execution, and he afterwards buys the same land from the purchaser, his title is not fraudulent, and the land cannot be attached for the debts of the original fraudulent grantor.—DIMOCK v. RIDGEWAY, Mass., 48 N. E. Rep. 338.

52. FRAUDULENT CONVEYANCES—Suit to Set Aside.—The rule that a creditor must reduce his claim to judgment before he can maintain a bill in equity to set aside a deed by his debtor as fraudulent is not obviated by the insolvency of the debtor and the danger of a transfer to an innocent purchaser.—AUSTIN v. BRUNER, Ill., 48 N. E. Rep. 449.

53. GAMING—Option Contracts.—The right of plaintiff to recover money which he in good faith, at defendant's request, advanced to pay losses on defendant's purchase, by contract valid by its terms, of grain on the board of trade, cannot be affected by defendant's intention, undisclosed to plaintiff, to close up the deal, on the basis of the contract being an option contract, instead of by receiving the wheat.—SCANLON v. WARREN, Ill., 48 N. E. Rep. 410.

54. GARNISHMENT—Receiver — Limitation.—In order to prevent the running of the 60-day limitation provided for in section 4241, Gen. St. 1894, the creditors must within the 60 days file with the clerk of the district court their petition for the appointment of a receiver of the insolvent debtor, or commence the proceedings by service of the order to show cause on the creditor about to be preferred within that time, or, if section 5144, Gen. St. 1894, applies, place such order in the hands of the sheriff for service within the 60 days. But whether the latter section applies in such a case is not decided.—IN RE FOOT, Minn., 73 N. W. Rep. 4.

55. GUARDIAN AND WARD.—Where a guardianship has not been actually closed, though the ward has been relieved of disability by marriage, an action against the guardian and ward to foreclose a lien upon guardianship property pledged by the guardian to secure a note given by her as such must, under Rev. St. 1895, art. 1194, § 6, be brought in the county in which the estate is being administered, though the note be payable in another county.—MCKAY v. MARSHALL NAT. BANK, Tex., 42 S. W. Rep. 868.

56. HOMESTEAD—Undivided Interest.—An undivided interest accompanied by exclusive possession will support the homestead right.—BROKAW v. OGLE, Ill., 48 N. E. Rep. 394.

57. HUSBAND AND WIFE—Community Property.—A married woman died leaving community property and community debts. Her husband married again, and then died: Held, that an order giving the second wife an allowance, and making it a charge on the husband's interest in the community property superior to community debts, was erroneous, since it resulted in throwing more than half the community debts upon

the first wife's share of the community property.—IN RE CANNON'S ESTATE, Wash., 50 Pac. Rep. 1021.

58. HUSBAND AND WIFE—Mortgage of Estate by Entireties.—Evidence that a husband and wife owning land by entireties were induced by a creditor of the husband to convey it to a third person, who reconveyed it to the husband alone; that the husband and wife then mortgaged it to secure the husband's debt; that there was no consideration for the first conveyance or for the reconveyance; that the deeds and the mortgage were executed at about the same time as parts of a continuous transaction; and that the wife did not intend to give absolute title to her husband, shows that the wife became surety for the husband's debt, and that the transaction was a device to evade the statute making a wife's contracts of suretyship void.—GRZESK V. HIBBERD, Ind., 48 N. E. Rep. 861.

59. INJUNCTION—Trespass.—A bill alleging that defendants, as principal and agents, had taken and sold wood belonging to complainant, and intended to repeat such trespasses unless restrained by injunction, and that defendants were insolvent, made a case, on the face of the bill, authorizing the interference of a court of equity, by injunction restraining further trespasses.—KAUFMAN V. WIENER, Ill., 48 N. E. Rep. 479.

60. INTOXICATING LIQUORS — Collateral Attack.—When, after proceedings before the board of commissioners to obtain a liquor license, an appeal is taken to the circuit court, and a judgment there rendered granting the license, such judgment, though possibly erroneous, is not void; and, until it is reversed, the right of the applicant to all the privileges of the license cannot be collaterally attacked, even by the State.—LUDWIG V. STATE, Ind., 48 N. E. Rep. 890.

61. JUDGMENT—Collateral Attack — Water Right.—Where the rights and priorities between irrigating ditches were adjudicated, and final decree rendered declaring that defendants' ditch had priority over plaintiffs', this adjudication cannot be attacked in a subsequent suit to restrain defendants in the use of their ditch on the ground of plaintiffs' prior rights and abandonment by defendants.—HALL V. LINCOLN, Colo., 50 Pac. Rep. 1047.

62. JUDGMENT—Jurisdiction.—Where a court of general jurisdiction assumes jurisdiction of an action on a contract, it is presumed that such jurisdiction exists.—MCMAHON V. EAGLE LIFE ASSN., Mass., 48 N. E. Rep. 839.

63. JUDGMENT—Lien.—Under Rev. St. § 2902, a judgment becomes a lien only on such interest as the judgment defendant has in real estate at the time it is docketed; and where, prior to such date, he had conveyed the land to a *bona fide* purchaser, the land is not subject to the judgment, though the deed had not been recorded.—STANHILBER V. GRAVES, Wis., 73 N. W. Rep. 48.

64. JUDGMENTS—Vacation.—Where a case had been pending nearly two years, and defendant then employed an attorney to look after it, but for eight months thereafter neither he nor his attorney made any preparation for trial, at the expiration of which time, the case being reached for trial, defendant defaulted, such default judgment will not be vacated, as defendant has not used diligence in prosecuting his suit.—HAHN V. GATES, Ill., 48 N. E. Rep. 893.

65. JUDICIAL SALES—Deficiency in Quantity.—While the court will grant equitable relief where a purchaser at judicial sale has been deceived by the action of the court or the misrepresentations of its agents as to the amount of land sold, whether this relief be sought before or after the confirmation of the sale, yet the purchaser is not entitled, as matter of right, even after confirmation, to an abatement of the purchase price on account of a deficiency in the quality of the land, where the other parties in interest insist upon a rescission on equitable principles.—TRIGG V. JONES' ADMR., Ky., 42 S. W. Rep. 848.

66. LANDLORD AND TENANT—Fixtures—Removal.—A lessee who erects buildings which cannot be removed without injury to the freehold, though he may have the right to remove the same while holding under his lease, cannot do so after the expiration of the old and the execution of the new lease, not containing any reservation of such right, and wherein he covenants to keep the premises in repair, and to deliver up the same in as good condition as they were when entered upon.—SANITARY DIST. OF CHICAGO V. COOK, Ill., 48 N. E. Rep. 461.

67. LANDLORD AND TENANT—Wrongful Eviction—Damages.—Although a landlord recovers a judgment of eviction against his tenant for failure to pay rent, yet if the latter tenders to the landlord or brings into court the rent in arrear, with interest and costs of the action, within six months after possession obtained by the landlord, and performs the other covenants on the part of the tenant, as provided by Gen. St. 1894, § 5865, such judgment thereby becomes inoperative and non enforceable; and if the landlord, without further default by the tenant in any of the conditions of the unexpired lease, forcibly evicts the tenant from the premises, he is liable in damages, and the tenant may maintain an action therefor, notwithstanding the statutory provision for restitution, as the latter remedy is cumulative, and not exclusive.—WACHOLZ V. GRIESGRABER, Minn., 73 N. W. Rep. 7.

68. LIBEL—Matter Libelous Per Se.—A publication in Texas, where arrest in civil action is unknown, that plaintiff had been "arrested" in Missouri on a warrant sworn out by the company which had brought suit against him to recover money "which it alleged was advanced to him several years ago," but, as he "had not been in the State since then, the papers could not be served," etc., is libelous *per se*, imputing that plaintiff had been guilty of felony in fraudulently obtaining or misapplying the money referred to.—A. H. BELO & CO. V. SMITH, Tex., 42 S. W. Rep. 850.

69. LIMITATION OF ACTIONS—Conflict of Laws.—Under Ky. St. § 2542, which provides that "when a cause of action has arisen in another State or country between residents of such State or country, or between them and residents of another State or country, and by the laws of the State or country where the cause of action accrued an action cannot be maintained therein by reason of the lapse of time, no action thereon can be maintained in this State," an action can be maintained in Kentucky, between citizens of another State or States, upon a cause of action which accrued in another State, provided the action would not be barred in such State if it had been brought there, although it would be barred if the cause of action had accrued in Kentucky.—JOHN SHILLITO CO. V. RICHARDSON, Ky., 42 S. W. Rep. 847.

70. MARRIAGE—Common-law Marriage.—A common-law marriage is not shown by irregular cohabitation and partial reputation.—TAYLOR V. TAYLOR, Colo., 50 Pac. Rep. 1049.

71. MASTER AND SERVANT—Assumption of Risk.—The employer of an experienced workman is not rendered liable for injuries to the latter, who fell through an opening in a floor of a building under construction, cut by authority of the contractor, by failure to guard the opening or warn the workman of the danger thereof, as such workman assumed the risk of his employment.—BEIQUE V. HOSMER, Mass., 48 N. E. Rep. 838.

72. MASTER AND SERVANT — Assumption of Risk.—Where the master promises to remove a defect that a servant complains of, the servant may rely thereon, and continue in the service, without assuming the risk of the defect, for only such time thereafter as is reasonably sufficient to enable the master to remove the defect.—ILLINOIS STEEL CO. V. MANN, Ill., 48 N. E. Rep. 417.

73. MASTER AND SERVANT—Negligence—Fellow-servants.—M, authorized by defendant to direct the character of work to be done by its employees, requested decedent, a skilled mechanic, and other machinists, to co-operate in putting a new driving spring into a locomotive, and, when the spring was not in a proper

place, a fellow-machinist proposed to strike it with a heavy iron; and M held a torch while he did so, and the spring was driven into place with such force as to cause an iron tool to strike decedent, and kill him: Held, defendant was not liable, as a master is not bound to warn skilled servants against the improper use of appliances, and hence M's failure to suggest danger was that of a fellow-servant.—KERNER v. BALTIMORE & O. S. W. RY. CO., Ind., 48 N. E. Rep. 364. 282

74. MASTER AND SERVANT—Negligence of Foreman—Fellow-servants.—Plaintiff, while working for defendant with a gang employed in moving coal, was injured by the falling of an overhead timber, to which a bucket for hoisting the coal was attached. It was shown that such timber was not a customary appliance in moving coal, and that it was put up at the direction of plaintiff's foreman, before plaintiff began work on the coal by one employed by the same master to do only mechanical work, and whose work had no connection with that of the coal gang: Held, that the negligence was that of the foreman, and not that of a fellow-servant.—JARNEK v. MANITOWOC COAL & DOCK CO., Wis., 73 N. W. Rep. 62.

75. MASTER AND SERVANT—Railroads—Negligence.—A tower man whose duty it is to operate gates at a railroad crossing may rely upon the company and its servants performing their duty with due care, and is not obliged to inspect the company's property, except such as is connected with the performance of his own duty.—LAKE SHORE & M. S. RY. CO. v. CONWAY, Ill., 48 N. E. Rep. 483.

76. MECHANIC'S LIEN — Fixtures.—Wainscoting attached with screws to strips nailed to the wall of a building to be used as a saloon, and oak veneering nailed on, and a door with casing and frame attached to the building, are not trade fixtures, as between a lessee, at whose instance they were put up, and the mechanic, but form alterations or repairs in the building, authorizing a lien on the leasehold for the labor and materials.—MATTHIESEN v. ARATA, Oreg., 50 Pac. Rep. 1015.

77. MECHANIC'S LIEN—Statement.—Under Mechanic's Lien Act, §§ 4, 28 (3 Starr & C. Ann. St. pp. 819, 822), declaring that, in order to enforce a lien, a claimant must file a statement of account, setting forth the times when the material was furnished or the labor performed, etc., "verified by affidavit," an affidavit that the statement contains a true account of materials furnished, and that there is due therefor the sum stated, is insufficient, because it fails to verify that part of the statement setting forth the dates when the materials were supplied.—ORR & LOCKETT HARDWARE CO. v. RUSSELL, Ill., 48 N. E. Rep. 444.

78. MORTGAGE FORECLOSURE SALE.—A purchaser at foreclosure sale is entitled to possession before confirmation of the sale, since 2 Hill's Code, § 508, providing that sales shall be confirmed unless objections are filed and substantial irregularities in the proceedings appear, deprives such sales of the character of strictly judicial sales; and hence the knocking down of the property is the "sale," within section 419, providing that the purchaser is entitled to possession "from the day of sale" until a "resale."—STATE v. NORTHWESTERN & P. HYPOTHEEK BANK, Wash., 50 Pac. Rep. 1023.

79. MORTGAGES—Subrogation.—A person, without any previous interest, who pays a mortgage debt at the instance of the mortgagor, and takes a mortgage on the same property, believing that he is getting security equal to that held by the person whose debt he pays, may, when no innocent person can be injured, be subrogated to his rights.—GEORGE v. BUTLER, Utah, 50 Pac. Rep. 1032.

80. MORTGAGE—Wife's Separate Estate—Suretyship.—A conclusion of law that a mortgage to a corporation on a wife's separate estate, and the notes secured thereby, were executed by her as surety for her husband, and were therefore void (Rev. St. 1881, § 5119; Rev. St. 1894, § 6964), is sustained by findings that the sole consideration was the issuance of corporate stock by the mortgagee to the husband, and that the wife received none of the stock.—LESCHEN v. GUY, Ind., 48 N. E. Rep. 344.

81. MUNICIPAL CORPORATIONS—Action Against City—Condition Precedent.—It is solely in actions against a city of the second class having more than 5,000 inhabitants, to recover damages resulting from negligence, that the filing with the clerk of such city of the detailed statement required by the provisions of section 34, art. 2, ch. 14, Comp. St., is a condition precedent to a recovery.—DOVEY v. CITY OF PLATTSMOUTH, Neb., 73 N. W. Rep. 11.

82. MUNICIPAL IMPROVEMENTS—Condemnation Proceedings—Damages.—In a proceeding against a railroad corporation to extend a street across its right of way, persons acquainted with the value of land in the vicinity may give their opinions as to the amount of damages sustained by defendant, though they have no experience in operating a railroad, and do not know the special uses to which railroad lands may be legitimately put.—ILLINOIS CENT. R. CO. v. CITY OF CHICAGO, Ill., 48 N. E. Rep. 492.

83. MUNICIPAL CORPORATIONS — Council.—Since the enactment of Laws 1897, ch. 98, which provides that a common council may, by resolution, discontinue the publication of its proceedings, a common council may, by resolution, discontinue the publication of its proceedings in a newspaper, and advertise for bids to publish such proceedings in pamphlet form, without requiring the bidders to be newspaper publishers, although the charter contains a provision that such proceedings be published in a newspaper.—CITY OF MILWAUKEE v. STATE, Wis., 73 N. W. Rep. 23.

84. MUNICIPAL CORPORATIONS—Defective Streets.—In an action for injuries from defects in a street, a charge that the burden of proof is on defendant to prove contributory negligence, "and the fact (if it is a fact) that makes proof on the trial from which you may or may not infer that there was negligence on the part of plaintiff does not cast the burden on plaintiff," was misleading; the rule being that, if plaintiff can prove his case without disclosing contributory negligence, defendant has the burden of proving such negligence.—RHYNER v. CITY OF MENASHA, Wis., 73 N. W. Rep. 41.

85. MUNICIPAL CORPORATIONS — Defective Streets—Negligence.—Whether the failure of a city to remove unused street railway tracks is the proximate cause of an injury to one who, by reason of the elevation of the tracks above the street, was unable to avoid a collision with a runaway horse, is a question of fact, not reviewable on appeal from the appellate court.—CITY OF ROCK FALLS v. WELLS, Ill., 48 N. E. Rep. 440.

86. MUNICIPAL CORPORATIONS—Ice.—A city which allows snow and ice to accumulate in an uneven and dangerous condition, and to remain on the sidewalk for a long time, is liable for injuries sustained by reason of its formation into a slippery and uneven surface of ice, caused by a sudden change of weather.—SALZER v. CITY OF MILWAUKEE, Wis., 73 N. W. Rep. 20.

87. MUNICIPAL CORPORATIONS — Liability to Parent for Death of Child.—Rev. St. 1879, art. 2899, authorizing an action by parents for actual damages for the death of their child by the negligence or wrongful act of another, does not apply where death was caused by the negligence or wrongful act of a municipal corporation.—SEARIGHT v. CITY OF AUSTIN, Tex., 42 S. W. Rep. 857.

88. MUNICIPAL CORPORATIONS—Negligence—Ice.—One who slips and falls on an icy sidewalk cannot recover from the city unless some defect in the walk concurred with its slippery condition in producing the accident; and the mere fact that the walk consisted of three boards, eight inches wide, laid parallel with the street, does not constitute such defect.—BEATON v. CITY OF MILWAUKEE, Wis., 73 N. W. Rep. 58.

89. MUNICIPAL CORPORATIONS—Ordinances—License.—An ordinance requiring a license for carrying on the jewelry business in the town, and declaring a fine for

carrying it on without the license, is *ultra vires*, where the power to pass it is not expressly or impliedly granted the town; it not being an inherent power, essential to its existence or good government.—TOWN OF MENA V. SMITH, Ark., 42 S. W. Rep. 831.

90. MUNICIPAL CORPORATIONS — Public Improvements.—Where a public improvement designated by an ordinance is "lamp posts" only, and the description of the improvement in the ordinance includes conduits, cables, switches, and lamps, as well as lamp posts, it does not authorize an assessment for the improvement.—SMITH V. CITY OF CHICAGO, Ill., 48 N. E. Rep. 445.

91. MUNICIPAL CORPORATIONS—Special Assessments.—Where the affidavit of mailing notices in a special assessment proceeding omits the signature to the jurat, but a notarial seal bearing a name is impressed below, and the judgment of confirmation recites a finding of compliance with the law as to notice, such omission cannot be urged in a collateral attack on the judgment of confirmation, since the presumption is that it was supplied by other evidence.—LARSON V. PEOPLE, Ill., 48 N. E. Rep. 443.

92. MUNICIPAL CORPORATIONS—Special Municipal Assessments.—When a special assessment has been levied for local improvement in Chicago, an amendatory ordinance, afterwards passed by the city council, providing merely that the assessment shall be paid in installments, and not in a single sum, as provided by the original ordinance, does not vacate the assessment already made; hence a reassessment is unnecessary.—TRIMBLE V. CITY OF CHICAGO, Ill., 48 N. E. Rep. 416.

93. NEGLIGENCE — Independent Contractor.—A proprietor of land is liable for the negligence of an independent contractor in clearing his land, resulting in the burning of the property of the adjacent owner, where the negligence flows directly from the acts which the contractor agrees to do, and is by the proprietor authorized to do, and is the natural and probable consequence of the performance of the work in the manner and at the time agreed on.—CAMERON V. OBERLIN, Ind., 48 N. E. Rep. 386.

94. NEGLIGENCE — Question for Jury.—It is not negligence *per se* to attempt to board a moving cable car, but the question is for the jury, where there is any evidence that the one making the attempt was exercising due care.—NORTH CHICAGO ST. RY. CO. V. WISWELL, Ill., 48 N. E. Rep. 407.

95. OFFICE AND OFFICERS — Public Officers — Assignment of Salary.—Though an assignment of salary or fees to become due to a district attorney for services to be subsequently rendered is not filed with the county auditor until after such services are rendered, the assignment will be considered as made before the rendition of such services, where it presumptively appears that it was held by the auditor, from about the time it was executed, as agent of the assignee.—STATE V. BARNES, S. Dak., 73 N. W. Rep. 80.

96. OFFICER—Absconding Officers—Trustee — Action to Recover Trust Funds.—A trustee appointed to collect and administer the funds of a defaulting public officer has a right to sue in his own name for the recovery of the misappropriated funds, where the beneficiaries are very numerous, and many claims small in amount, and it would be impracticable to sue in the names of all.—SHEPHERD V. MERIDAN NAT. BANK, Ind., 48 N. E. Rep. 346.

97. PARTNERSHIP — Dissolution by One Partner.—Equity will not generally interfere at the suit of one partner to prevent a dissolution by the other partner before the time named in the partnership agreement.—KARRICK V. HANNAMAN, U. S. S. C., 18 S. C. Rep. 135.

98. PARTNERSHIP—Evidence.—Evidence that plaintiff, at defendant's suggestion, took a lease of a coal mine in his own name for their joint benefit, that they both contributed to the expense of working the mine, and that plaintiff gave defendant a written agreement for a division of the profits and losses of working the mine, is sufficient to show that the parties were copartners in the mine.—HODGSON V. FOWLER, Colo., 30 Pac. Rep. 1034.

99. PARTNERSHIP—Settlement of Accounts.—In an action for a settlement of the accounts of a firm engaged in the business of buying and selling live stock, memorandum books kept by one of the partners, in which partnership and individual transactions are confused, and from particular entries in which it is often hard to determine whether stock was bought or sold, are, if competent as evidence, entitled to but small weight.—WILSON'S ADMR. V. POTTER, Ky., 42 S. W. Rep. 836.

100. PLEADING—Answer—Allegation of New Matter.—Where a petition declares for a balance due upon a contract, and the answer pleads payment, such plea is a material allegation of new matter, within the meaning of section 134 of the Code of Civil Procedure.—CULBERTSON IRRIGATING & WATER POWER CO. V. COX, Neb., 73 N. W. Rep. 9.

101. PLEADING—Parties — Substitution.—A suit having been begun by an administratrix on a contract of life insurance, the petition not showing who was the beneficiary, it was not error to permit plaintiff to amend by alleging that she was the beneficiary in her own right, and by striking out the allegations of her representative capacity.—BURLINGTON VOLUNTARY RELIEF DEPARTMENT OF CHICAGO, B. & Q. R. CO. V. MOORE, Neb., 73 N. W. Rep. 15.

102. PLEDGES.—One who retains one of a number of horses for the keeping of which he has a claim against the owner, under an agreement by the owner that he may retain the horse until the claim is paid, has a lien thereon for the amount of his claim, such a transaction constituting a pledge.—MEGUIAR V. THOMAS, Ky., 42 S. W. Rep. 846.

103. PRINCIPAL AND AGENT — Authority of Agent.—A principal is not liable for acts of his agent outside the scope of the agency, unless, with knowledge of such acts, he has given others reasonable cause to believe that the agent had authority to do such acts.—MT. MORRIS BANK V. GORHAM, Mass., 48 N. E. Rep. 341.

104. PRINCIPAL AND AGENT — Payment to Agent. — In an action to foreclose a mortgage given to secure a loan, and paid before maturity to plaintiff's agent, who made the loan, it appeared that he had charge of plaintiff's business, and had full authority to receive payment on mortgage loans when they matured, or to extend the time of payment; that plaintiff gave the agent full authority to negotiate loans on real estate, and trusted implicitly to his judgment in all matters. In making loans, the agent determined the time they should run, passed on the title, was made trustee in the mortgage, retained possession of the papers during the life of the loan, and had authority to reloan the principal when paid. The scope of his authority was not limited by any definite writing or language: Held, that the agent had implied authority to receive payment before maturity.—THORNTON V. LAWTHER, Ill., 48 N. E. Rep. 412.

105. QUO WARRANTO—Cost. — A *quo warranto* proceeding, instituted on relation of a person claiming an office, and prosecuted by private counsel, and in which the district attorney takes no part, except to sign the information, is a civil action, within Rev. St. 1895, art. 1425, providing that the successful party shall recover all costs of his adversary except when otherwise provided. — HUSSEY V. HEIM, Tex., 42 S. W. Rep. 859.

106. QUO WARRANTO — Vacation of Franchise. — The remedy to set aside a franchise irregularly or fraudulently granted, where the party to whom it has been granted is in the exercise of the privileges it confers, is by *quo warranto* or *scire facias* at the suit of the State, and not by an equitable action at the suit of private parties. — STEDMAN V. CITY OF BERLIN, Wis., 73 N. W. Rep. 57.

107. RAILROADS—Mortgages.—Where foreclosure proceedings were consolidated, under one style, with

general creditors' bill against an insolvent corporation, in which a receiver had been appointed for all its property, and a decree was passed ordering a sale, and providing for the disbursement of the proceeds to the mortgagee, subject to prior liens, to be ascertained by the court, ample opportunity being given to all persons to present their claims, the consolidated cause was construed as a general creditors' proceeding. — HILL V. SOUTHERN RY. CO., Tenn., 42 S. W. Rep. 888.

108. RAILROAD COMPANY — Accident at Crossing — Negligence. — Though the failure of a railroad company to give the statutory signals at crossings is negligence, still, to entitle an injured person to recover, he must show that such negligence was the proximate cause of his injuries, and that he was free from contributory negligence. — BALTIMORE & O. S. W. RY. CO. V. CONOYER, Ind., 48 N. E. Rep. 352.

109. RAILROAD COMPANY—Contributory Negligence.—Where plaintiff, before going upon defendant's tracks, noticed cars in motion on the tracks north of him, and saw cars backing towards him from the south, and, in order to avoid these, he crossed to the main line, and, instead of walking in between these two tracks, followed down that track 30 or 40 yards, without even looking round to see if there were any cars coming from behind, he is guilty of contributory negligence.—ST. LOUIS, I. M. & S. RY. CO. V. TAYLOR, Ark., 42 S. W. Rep. 831.

110. RAILROAD COMPANY—Negligence.—Under a petition alleging that a locomotive engineer negligently and willfully opened a valve in his engine while plaintiff's horse was very near, thus frightening the horse, and causing him to run away, plaintiff is not entitled to recover for damages resulting from the engineer's negligent failure to discover the proximity of the horse.—WALLACE V. SAN ANTONIO & A. P. R. CO., Tex., 42 S. W. Rep. 865.

111. RAILROAD COMPANY—Negligence—Right of Way.—While the traveling public and street cars have equal rights to use the public streets, street cars, *ex necessitate*, have a right of way on their tracks; and, although this does not give them a right to exclude the public, in case of conflict the individual traveler must yield.—HOT SPRINGS ST. RY. CO. V. JOHNSON, Ark., 42 S. W. Rep. 833.

112. REPLEVIN AGAINST SHERIFF. — Replevin will not lie against a sheriff who is in possession of the property under a requisition in claim and delivery proceedings in a pending replevin action, unless he fails to deliver the property to the party to the first replevin action entitled thereto, within a reasonable time after it becomes his duty to do so.—WELTER V. JACOBSON, N. Dak., 73 N. W. Rep. 65.

113. SALES — Contract to Furnish Elevator.—Under a contract to furnish an elevator of a particular kind and capacity "suitable for passenger and freight service," the contractor must furnish an elevator suitable for the purposes for which it is to be used before he can demand any part of the contract price.—CLARKE V. JOHNSON FOUNDRY & MACHINE CO., Ky., 42 S. W. Rep. 844.

114. SALE—Warranty—Waiver.—Written notice of the failure of a machine, after trial thereof, to respond to the warranty under which it is sold, is not necessary where the seller's agent acquires knowledge of the defects within the time limited for trying the machine.—BURK V. KEYSTONE MANUFG. CO., Ind., 48 N. E. Rep. 882.

115. STATUTES — Construction — Provisos.—A proviso or exception in a statute relates to the paragraph or distinct portion of the enactment which immediately precedes it, unless the contrary intention is clearly apparent from the statute. — LEADER PRINTING CO. V. NICHOLS, Okla., 50 Pac. Rep. 1001.

116. TAXATION—Board of Equalization.—A board of equalization cannot place a valuation on property for assessment that has been returned by the assessor without having placed on it any value.—LYMAN V. HOWE, Ark., 42 S. W. Rep. 880.

117. TAXATION — Cattle.—Cattle owned and kept in one county, but moved to another, and pastured upon lands leased for that purpose from November 2, 18[illegible] till about April 1, 1894, with the intention of the owners, when the cattle were moved, to keep them in the latter county until the expiration of the lease, on May 1, 1894, unless the pasturage should sooner become insufficient in the former county, were situated in the latter county on January 1, 1894, within the meaning of Const. art. 10, § 11, and Rev. St. 1895, art. 5068, and there subject to taxation for the year 1894.—CLAMPITT V. JOHNSON, Tex., 42 S. W. Rep. 866.

118. TAXATION—Illegal Taxation—Injunction.—Equity will not interfere to restrain the payment of illegal taxes, a part of which are claimed to be illegal, and a part of which are admitted to be legal, unless the parties seeking the equitable relief shall first pay or tender to be paid the taxes which are due, and a suitable averment of such payment or tender of payment must appear in the pleading by which the relief is sought.—STATE NAT. BANK V. CARSON, Okla., 50 Pac. Rep. 990.

119. TRIAL—Improper Remarks of Counsel.—A statement of counsel in a personal injury case, in his argument, that "we will ask for no instructions, for instructions are very dangerous on the part of the plaintiff," and that, "when the court does instruct you you will notice that the instructions will be on the theory of the defense," is not ground for reversal where objection thereto was sustained by the court and counsel, after a reprimand from the court, withdrew the remarks, and no charge was asked instructing the jury to disregard them.—WEST CHICAGO ST. RY. CO. V. WANIATTA, Ill., 48 N. E. Rep. 437.

120. TRUSTS — Action to Establish.—W procured M, a tax collector, to prosecute a suit for delinquent taxes on land owned in common by W and the defendants in said suit, to perfect title in W, who acted for herself and defendants, and with their consent. She furnished M with money to pay the taxes and the costs of suit, and M undertook to buy the land at the sale for her, and take the deed in her name; but he bought it in his own name, and had the sheriff's deed made to him: Held, that the fact that W was not a defendant to the tax suit, did not prevent her maintaining an action against M's grantee to establish a trust in such land.—WOLCOTT V. WILSEY, Mo., 42 S. W. Rep. 825.

121. USURY.—It is not usury for a lender charging the highest rate of interest allowed by the statute to require interest for the first year to be paid in advance.—WILLETT V. MAXWELL, Ill., 48 N. E. Rep. 473.

122. WILLS—Bond of Contestant.—Where one claiming land under a will brings suit against the heirs of testator to quiet title, defendants may set up the invalidity of the will by cross complaint, and demand affirmative relief thereon, without complying with Horner's Rev. St. 1897, § 2597, requiring one contesting a will to give bond.—PUTT V. PUTT, Ind., 48 N. E. Rep. 356.

123. WILLS—Liability of Devisees.—Testator devised land to his executor during the lifetime of G, directing him to pay the income thereof to G for his support, and, if necessary, sell a part of the land for that purpose. At G's death the remainder of the land, if unsold, or, if sold, the proceeds remaining after paying for G's support and funeral expenses, was to go to testator's nieces: Held, that G's maintenance and funeral expenses were a lien on the land so devised.—CLARK V. MARLOW, Ind., 48 N. E. Rep. 359.

124. WITNESS — Impeachment in Immaterial Fact.—Where a witness accounted for his presence at the scene of an accident by stating that he had gone there to vote at an election, it was proper to exclude the testimony of another witness tending to show that that would not have been the proper polling place for one living where the first witness had claimed to live.—CHICAGO CITY RY. CO. V. ALLEN, Ill., 48 N. E. Rep. 414.